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IN THE

Supreme Court of the United States

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court For the District of Columbia

BRIEF OF AFL-CIO APPELLANTS/CROSS-APPELLEES

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QUESTIONS PRESENTED

1. Whether the BCRA § 203 prohibitions of union and corporate spending for "electioneering communications," under the primary and backup definitions of that term, are narrowly tailored to serve a compelling governmental interest.

2. Whether the provisions prohibiting coordinated expenditures in BCRA §§ 202 and 214(a) are constitutional in light of the statute's mandate that no definition of "coordination" may require proof of "agreement or formal collaboration" and in light of BCRA's vagueness and overbreadth.

3. Whether BCRA's "advance disclosure" provisions are narrowly tailored to serve a compelling governmental interest.

PARTIES TO THE PROCEEDINGS

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") and its federally registered political committee, AFL-CIO Committee on Political Education Political Contributions Committee (jointly the "AFL-CIO plaintiffs"), appear here as appellants in No. 02-1755 and as appellees in *Federal Election Comm'n v. McConnell*, No. 02-1676, and *McCain v. McConnell*, No. 02-1702. The appellees in No. 02-1755 and appellants in Nos. 02-1676 and 02-1702 are the Federal Election Commission, the Federal Communications Commission, the United States of America, Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords.

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OPINIONS BELOW

The district court's opinions dated May 1, 2003 are reported at 251 F. Supp. 2d 176 (D.D.C. 2003), and are reprinted in volumes I—IV of the Supplemental Appendix to Jurisdictional Statements ("S.A."). The district court's order dated May 19, 2003 staying its final judgment pending appeal and the related memorandum opinions are reported at 253 F. Supp. 2d 18 (D.D.C. 2003).

JURISDICTION

The district court entered judgment on May 2, 2003. The AFL-CIO plaintiffs filed their timely notice of appeal on May 7, 2003. J.S. App. 1a-2a. The jurisdiction of this Court is invoked under § 403(a) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, § 403(a)(3), 116 Stat. 113-114 (2002).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution is reprinted in pertinent part in the jurisdictional statement filed on behalf of the AFL-CIO plaintiffs at 2. BCRA is reprinted in full in the appendices to the jurisdictional statements in Nos. 02-1674, 02-1675, and 02-1676. Sections 201, 202, 203 and 214 of BCRA are reprinted at J.S. App. 4a-13a.

STATEMENT OF THE CASE

In accordance with the Court's order dated June 5, 2003, all of the issues raised by the AFL-CIO plaintiffs in the district court are addressed in this Opening Brief.

BCRA's Ban On Union and Corporate Electioneering Communications

BCRA §203, which prohibits corporate and union expenditures for broadcast advertisements through a primary and backup definition of covered electioneering communications, poses an immediate, direct and substantial threat to the AFL-CIO's historic role in advocating for progressive social legislation, influencing other government actions affecting workers and their families, and educating union members and

the general public about these issues: The AFL-CIO spends millions of dollars annually for television, radio and cable advertisements on a wide variety of social and economic issues.[1] This program began in the wake of the 1994 national election, when the organization ran numerous radio and television ads to mobilize union households and the general public to oppose the new Republican-controlled Congress's attempts to enact the "Contract With America," including major cuts in federal funding for jobs, health and safety, housing, school lunches and the Medicare and Medicaid programs. Shea Dec. ¶¶ 20-27 (J.A. 781-85) and Exhs. 20-24, 27-28. Later, after President Clinton vetoed a draconian budget proposal adopted by the Congress and the federal government was forced to shut down, the AFL-CIO broadcast advertisements supporting the President's position and opposing the congressional budget cuts. Mitchell Dec., ¶¶ 30-32 (J.A. 440-41) and Exhs. 26-31; Shea Dec., ¶ 27 (J.A. 785) and Exh. 28. Virtually all of these ads urged viewers or listeners to call named Members of Congress to oppose the budget cuts. See Mitchell Dec., Exh. 1 (J.A. 464). Several of these ads would have been banned if BCRA § 203 had been in effect because they referred to President Clinton by name and were disseminated within 30 days of the Iowa presidential caucuses and the New Hampshire presidential primary election in which the President was a candidate. Mitchell Dec. ¶32 (J.A. 441) and Exh. 1 (J.A. 464).

The AFL-CIO broadcast program continued throughout 1996 in an effort to shape the federal legislative agenda and to establish pro-worker public policies, Mitchell Dec. ¶¶ 34-36 (J.A. 442-44) and Exhs. 33-46; Shea Dec. ¶¶ 30-34 (J.A. 786-88) and Exhs. 38-41, including a long-overdue increase

[1] A comprehensive table summarizing the AFL-CIO's television and radio advertisements from 1995 through 2001, and videotapes and compact discs containing the actual ads themselves, are in the record. Mitchell Dec., Exhs. 1-22.

in the federal minimum wage.[2] *Id.*, ¶¶ 30-36 (J.A. 786-89) and Exhs. 33-46, 38-41. Most of these ads named individual Members of Congress and urged voters or listeners to contact them with a particular policy message. Mitchell Dec., Exh. 1 (J.A. 464). A large number of these ads also would have been banned if BCRA § 203 had been in effect because they ran within 30 days of primary elections, held throughout the election year, in which the named Members of Congress were candidates. Mitchell Dec. ¶¶ 32, 34-40, 50, 57-59 (J.A. 441-46, 451-52, 455-57) and Exh. 1 (J.A. 464). In addition, one of the AFL-CIO's ads on the subject of federal funding for education, an issue which was then pending before Congress, []would have been banned by BCRA §203 because it ran within 60 days of the November 1996 general election and named a number of candidates for Congress. Mitchell Dec. ¶ 41 (J.A. 446-47) and Exh. 1 (J.A.464).

The AFL-CIO's broadcast advocacy program was active throughout the next three Congresses as well, addressing issues such as tax fairness, Social Security and retirement, Medicare funding and prescription drug coverage, health care, minimum wage and overtime standards, workplace health and safety, international trade, and education. See Mitchell Dec., Exhs. 1-22. These ads continued to refer to individual Members of Congress because this is a key element of an ad's potency and effectiveness. Mitchell Dec. ¶¶ 11-12 (J.A. 428-30). And, while most of the ads named Republicans,[3] this was because throughout this period

[2] Other AFL-CIO ads in 1996 addressed congressional efforts to reduce Medicare and Medicaid benefits, Mitchell Dec., ¶¶ 37-38 (J.A. 444-45) and Exhs. 47-56, a proposal to protect the retirement savings of working families, *id.*, ¶ 40 (J.A. 445-46) and Exhs. 57-58, and another struggle over the federal budget. *Id.*, ¶ 42 (J.A. 447-48) and Exhs. 59-61.

[3] In selecting the "targets" of its advertising, the AFL-CIO relied on substantive and tactical factors: the nature of the issue; the Member of Congress's voting record, committee assignments and legislative role; whether the Member's response to an ad would generate "free media"

Republicans in Congress aggressively pursued a host of policies and programs disfavored by the labor movement, and Congress was so polarized that few Republicans ended up voting "right" and few Democrats voted "wrong" by AFL-CIO policy standards. Mitchell Dec. ¶¶ 13, 30-44 (J.A. 430, 440-49); Mitchell Dep. 163; Mitchell Cross 12, 101, 127-28, 198; Shea Dec. ¶¶ 20-35, 38-39, 42, 55 (J.A. 781-89, 792, 797) and Exh. 18. On important legislative issues where Democrats' vote inclinations were suspect, including during election years, the AFL-CIO regularly targeted them as well.[4]

In striking down BCRA § 203's prohibition of union and corporate sponsorship of ads encompassed by the primary definition of electioneering communications, Judges Henderson and Leon both found that the prohibition would have a substantial effect on the AFL-CIO's legislative and policy program. Thus, Judge Henderson found that "BCRA's ban on corporate and labor disbursements for electioneering communications . . . will significantly interfere with the AFL-CIO's missions" of providing "an effective political voice to workers on public issues that affect their lives and to fight for an agenda at all levels of government for working families." S.A. 264sa. Judge Henderson also made detailed findings

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coverage influencing other Members; the presence among viewers or listeners of substantial numbers of union members; and whether a seriously contested election was likely or underway, due to the ensuing heightened public and policymaker attention and the incumbent candidate's sensitivity to public opinion. Mitchell Dec., ¶¶ 12, 14 (J.A. 429-31); Mitchell Dep. 17-20, 27-30, 165, 204-06, 209-12; Mitchell Cross 102, 198-200; Shea Dep. 52-53. Indeed, an effective way to influence an elected official's positions on issues is to make the official believe that embracing particular positions could win or lose him or her votes. Mitchell Cross 183, 189-90, 201; Shea Cross 14.

[4] See, *e.g.*, Mitchell Dec. Exh. 1 (J.A. 464): "Call" (July 1998, patient's bill of rights: 5 Democrats out of 16 Members named); "Barker" (September 1998, "fast track" trade policy: 2 of 8); "Trust" (April-May 2000, trade relations with China: 7 of 15); "Now" (October-November 2001, fast track: 17 of 25).

of fact regarding the AFL-CIO's television and radio advertisements, S.A. 264sa-75sa, including, *inter alia*, that numerous ads run by the AFL-CIO would be banned under BCRA, S.A. 268sa, and that they would be "significantly less effective" if they did not mention legislative events or had to be aired outside of the weeks immediately preceding primary and general federal elections. S.A. 269sa. Judge Leon cited one of the AFL-CIO's 1998 ads as "a classic example of a legislation-centered genuine issue advertisement," S.A.1150sa, and his findings of fact identify numerous other "genuine issue ads" run by the AFL-CIO that would have been prohibited under the primary definition of electioneering communications. S.A. 1370sa-1377sa.[5]

The majority's findings are supported by substantial evidence in the record. Had BCRA's prohibition on the use of union treasury funds to support "electioneering communications" been in effect between 1995 and 2001, it would have banned 18 flights of ads broadcast within 60 days of the 1996, 1998 and 2000 general elections in their entirety, with the exception of some versions of a 1998 ad that named Senators not then up for election.[6] And, the primary definition would have banned from one to 12 versions of an AFL-CIO ad in 18 of 34 flights aired within 30 days of

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[5] Judge Leon also relied exclusively on AFL-CIO advertisements as examples of ads that, in some cases, would be protected under his revised backup definition of electioneering communications and, in other cases, would be prohibited under that definition because they are not "neutral as to a federal candidate," S.A. 1163sa, 1377sa-79sa, although Judge Leon failed to explain the basis for his conclusion that these ads are entitled to less protection under the First Amendment than are the ads he approved.

[6] See Mitchell Dec., Exh. 1 (J.A. 464): in 1996 "No Two Way," "Retire," "Kids," "Medicare," "Students," "Taxes," "Home"; in 1998: "Deny," "Spear," "Barker," "Save"; in 2000: "Help," "Teacher," "Job," "Who," "Sure," "Debate," "Work".

various primaries and conventions.[7] The ads that would have been banned include:

- Several different flights of ads in 1996 that called on the House to schedule a vote on the first minimum wage increase since 1991; at least ten Representatives targeted in these ads who voted in March not to bring the bill up, later voted in August in favor of final passage. Shea Dec. ¶¶ 30-34 (J.A. 786-88).
- "Barker," an AFL-CIO radio advertisement that was broadcast in eight congressional districts beginning September 21, 1998 after a vote on "fast-track" legislation was hastily scheduled for September 25. Mitchell Dec., ¶ 53 (J.A. 453-54); Shea Dec., ¶ 47 (J.A. 794).
- "Job," a television advertisement that was broadcast between September 13 and 25, 2000 and targeted 14 Representatives who had voted to prevent an important OSHA regulation from being implemented; President Clinton had threatened to veto the Labor-HHS budget bill if it retained the rider removing the regulation. Mitchell Dec., ¶ 61 (J.A. 457).
- "No Two Way," a radio and television advertisement focusing on an incipient budget fight in Congress that ran between September 5 and 17, 1996 in media markets serving approximately 35 congressional districts. Mitchell Dec., ¶ 41 (J.A. 446-47).
- "Deny," a radio and television advertisement broadcast that ran between September 10 and 23, 1998, shortly before the Senate was scheduled to vote on an HMO reform bill that the AFL-CIO considered weak. Mitchell

[7] See Mitchell Dec., Exh. 1 (J.A. 464): in 1996: "Too Far" (banning 1 of 19 versions); "1991" (3 of 10); "Raise" (1 of 2); "People" (2 of 21); "Couple" (2 of 30); "Wither" (4 of 26); "5.15" (1 of 4); "Edith" (12 of 31); "Another" (6 of 26); and "No Two Way" (10 of 31; and the 60-day rule would have banned all 31). In 1998: "Call" (12 of 16) and "Soon" (1 of 3). In 2000: "Label" (2 of 14, including one Democrat); "Endure" (1 of 16, a Democrat); "Trust" (3 of 15, including one Democrat); "Sky" (1 of 12); "Protect" (2 of 14); and "Help" (3 of 12).

Dec., ¶ 51 (J.A. 452-53). "Deny" targeted approximately 17 Senators whom the AFL-CIO and its allies believed could be persuaded to vote for a stronger version of the bill; 13 of these Senators were not candidates in the imminent 1998 election, but four were. *Id.*

While some of the AFL-CIO's broadcast advocacy may in some cases indirectly influence election outcomes by addressing issues of interest to the electorate, S.A. 684sa-685sa, advancing specific electoral outcomes has never been the point of the AFL-CIO's broadcast advocacy. Mitchell Dec., ¶ 70 (J.A. 462-63). As the AFL-CIO's Director of Public Affairs testifed, these advertisements sought to "set the agenda for the legislative and political environment," put lawmakers "on notice that somebody is watching what they are doing," and make the AFL-CIO a "visible . . . champion[] for working families." Mitchell Dep. 18, 19; see also *id.* at 46-47.

BCRA's Coordination Provisions

BCRA's coordination provisions, like the statute's ban on corporate and union electioneering communications, will drastically limit the ability of the AFL-CIO and other unions to advocate the interests of workers and their families in connection with legislation and other government actions. It is critical for union representatives to be able to meet directly with Members of Congress and executive branch officials, including the President, Vice President and other senior White House officials. S.A. 285sa-286sa. Union representatives work with Congressional leaders and other legislators and executive branch officials to design and implement lobbying strategies aimed at passing or defeating specific legislation, including, as the record in this case amply demonstrates, grassroots lobbying efforts paid for by unions involving broadcast or other communications urging the public to take action. Union officers and members are also deeply involved in the operation of political party committees, particularly at the state and local levels where many

union representatives serve on the parties' governing bodies and provide substantial volunteer services in support of party programs.

The majority below found that BCRA §214(a), was neither unconstitutionally vague nor overbroad.[8] S.A 135sa-143sa. With respect to vagueness, the majority held that "[i]t is . . . possible that many, perhaps all, of Plaintiffs' vagueness concerns have been remedied by the [FEC] regulations' contents." S.A.137sa. And, with respect to overbreadth, the majority held that the statute's failure to require the existence of an "agreement" as a predicate to the finding of coordination was not required by the Constitution as interpreted in this Court's prior decisions. S.A.138sa-143sa. The majority determined that BCRA § 202, which provides that "coordinated" electioneering communications shall be treated as contributions, was not unconstitutional for the same reasons as it upheld § 214(a). S.A. 130sa. Judge Henderson dissented, with respect to all of BCRA's coordination provisions, S.A. 384sa-396sa, finding that "[a]n association operating under a vague or overbroad definition of coordination faces serious risks each time it sponsors public communications either directly or through groups of like-minded organizations or individuals because any discussion with a legislator may later serve as the basis for an allegation

[8] In their per curiam opinion, Judges Kollar-Kotelly and Leon also held that plaintiffs lacked standing to challenge BCRA § 214(c), S.A. 147sa-148sa, and, in a decision which paralleled their decision on BCRA §§ 202 and 214(a)(2), they alternatively ruled that plaintiffs' challenge to BCRA § 214(c) was not ripe for judicial review at this time because any vagueness in the statutory definition of coordination might be cured by the 2003 FEC regulations. S.A. 148sa-156sa. The majority also found that plaintiffs' challenge to BCRA §214(b), which repealed the December 2000 coordination regulations, was moot as a result of the promulgation of the January 2003 regulations. S.A.144sa. The Court need not address these decisions because, as we show, *infra*, the provisions of BCRA §§ 202 and 214(a)(2) clearly are ripe for decision and encompass all of the arguments made against §§ 214(b) and (c).

that an association has coordinated a particular communication's content with the legislator." S.A. 282sa. Specifically with respect to the AFL-CIO, she also found that "if the [organization] is prohibited from sponsoring broadcast ads because of its lobbying contacts with Members of Congress, it will be forced either to curtail its lobbying activities or to refrain from airing public communications during elections." S.A. 286sa. See *id.* at 281sa (finding that the ACLU's legislative activities would be covered by BCRA's coordination provisions "even though the ACLU does not engage in those activities for the purpose of influencing federal elections").

BCRA's Advance Disclosure Requirements

Two of BCRA's reporting provisions require that unions, corporations, individuals and other political actors must file reports with the FEC whenever they enter into a contract to make electioneering communications or independent expenditures, even though these communications have not yet aired. 2 U.S.C. § 434(f)(1)-(2); 2 U.S.C. §§ 434(g)(1)(A)-(B), 434(g)(2)(A)-(B). Judge Henderson found these advance disclosure requirements to be unconstitutional, S.A. 381sa-384sa, noting with respect to the AFL-CIO in particular that advance disclosure will interfere with and have a chilling effect on the organization's broadcast program by allowing its opponents to intensify their efforts to pressure stations into refusing to run AFL-CIO ads, S.A. 271sa, by forcing the organization to reveal its plans and strategies before they are finalized, *id.*, and by giving opponents the opportunity to prepare counter-messages. *Id.*

Although they upheld § 201(a)'s reporting requirement for electioneering communications in most respects, Judges Kollar-Kotelly and Leon also found that the statute's requirement of disclosure whenever a person has executed a contract to make a disbursement has the effect of "requiring disclosure of contracts to make electioneering communications prior to their public dissemination," S.A. 115sa, and therefore "lacks a

'relevant correlation' or 'substantial relation' . . . to a legitimate governmental interest." *Id.*, quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). With respect to §212's parallel advance disclosure requirement for independent expenditures, however, Judges Kollar-Kotelly and Leon found that plaintiffs' challenge was not ripe for review because of the FEC's promulgation of final regulations which, in their view, "provide Plaintiffs with the exact remedy they seek: the FEC will not require disclosure of independent express advocacy expenditures prior to their '[p]ublic disseminat[ion].'" S.A. 133sa.

SUMMARY OF ARGUMENT

1. BCRA's prohibition of union and corporate spending for a newly defined category of speech in the law, "electioneering communications," must be narrowly tailored to serve a compelling governmental interest. This prohibition applies where the First Amendment has its greatest and most urgent application, to speech concerning matters of public concern, including commentary on the activities of government officials, speech that inextricably intertwines discussion of issues, candidates and elections, and speech about the qualifications of candidates themselves. And, our jurisprudence establishes that the First Amendment's application to these matters is just as strong when the speaker is a union or a corporation. This Court has countenanced a governmental proscription only of express advocacy independent expenditures by a corporation, and solely because that spending was facilitated by the state-supported corporate form.

BCRA's primary definition of "electioneering communication" fails to adhere to the express advocacy line drawn by this Court since *Buckley*, and even if the government could ban other speech that is somehow connected with an election, the primary definition is overbroad. As applied to unions it substantially interferes with their core mission of advocating on behalf of all workers in the public sphere, and as applied to both unions and corporations it sweeps in a vast range of First Amendment protected speech whose connection with

elections is at most attenuated because its reliance on a candidate reference at certain places and times as a substitute for express advocacy fails accurately or narrowly to measure a range of speech that the government may regulate.

Each prong of BCRA's backup definition of "electioneering communication" is unconstitutionally vague. The phrase "suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate" depends on context for its meaning, its key words are undefined and imprecise, and its final phrase tracks a formulation that this Court held was overly vague in *Buckley*. The phrase "promotes or supports...or attacks or opposes a candidate" also depends on context and is undefined and imprecise, and the district court's construction of it rendered it unconstitutionally overbroad. Finally, the backup definition is non-severable, because Congress intended that either definition survive a constitutional challenge intact.

2. BCRA's definition of coordination must be narrowly and clearly drawn in order to avoid interfering with the freedom of speech, freedom of association, and the right to petition the government. BCRA § 214(a)(2)'s regulation of expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion" of a political party is vague and may reach a broad range of protected activities through which citizens interact with political parties. The majority's reliance on the fact that similar language appears in FECA's regulation of coordination with federal candidates was misplaced, since Congress has explicitly rejected the limiting construction given to that provision by the courts and the FEC, and four Justices have already found that FECA's language is overbroad.

The majority also erred in not reviewing the regulations issued by the FEC when it determined that those regulations might "possibly" cure any vagueness in the statutes. The district court had jurisdiction to consider the regulations, at

least to the extent necessary to determine whether they saved the constitutionality of the statutes, and, even a cursory examination of the regulations would have shown that they are vague and overbroad in critical respects.

Finally, the majority erred in concluding that "agreement or formal collaboration," which BCRA prohibits from being a required element of "coordination," is not constitutionally required. This Court's prior decisions strongly suggest that proof of an "agreement" is required, and, as the FEC previously recognized, "agreement or formal collaboration" is necessary to prevent the coordination provisions from infringing upon significant protected activities involving candidates and parties.

3. BCRA's provision requiring advance disclosure of electioneering communications within 24 hours after an individual, corporation or union has contracted to make such communications but *before* they have aired will have a significant chilling effect on the right to speak on public issues by forcing speakers to disclose their plans and strategies before they are implemented, giving their opponents the opportunity to prepare counter-messages, and allowing opponents to induce broadcasters not to run the communications at all. The advance notice requirement is not narrowly tailored to serve a compelling governmental interest, because all of the interests which this Court has recognized are served by disclosure of political expenditures are fully served by after-the-fact disclosure, as the lower federal courts have uniformly concluded.

ARGUMENT

I. BCRA's PRIMARY DEFINITION OF "ELECTIONEERING COMMUNICATION" IS UNCONSTITUTIONALLY OVERBROAD

Section 201(a) of BCRA, codified at 2 U.S.C. § 434(f)(3)(A), defines a category of speech new to the law, "electioneering communication,[9]" and § 203, codified at 2 U.S.C. §§ 441b(b)(2) and (c), proscribes labor organizations and corporations from financing such a communication. Section 203 prohibits speech on the basis of its content—namely, a "refer[ence]" to a "candidate" for federal office. "The First Amendment's hostility to content-based regulations extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co. of N.Y. v. Public Serv. Comm. of N.Y.*, 447 U.S. 530, 537 (1980). For, it "place[s] the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others. . . . [T]he government is held to a very exacting and rarely satisfied standard when it disfavors the discussion of particular subjects. . . ." *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring). *See also Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994) ("Our precedents apply . . . the most exacting

[9] Section 434(f)(3)(A)(i) contains what is generally termed the "primary definition" of this term, and section 434(f)(3)(A)(ii) contains a "backup definition" that would apply instead if the primary definition is finally held to be unconstitutional. The primary definition includes a transmission element ("any broadcast, cable or satellite communication"); a content element ("refers to a clearly identified candidate for federal office"); a temporal element (within 60 days before "a general, special or runoff election," or within 30 days before "a primary or preference election" or nominating "convention or caucus" "for the office sought by the candidate") and an audience element ("can be received by 50,000 or more persons" in the relevant electoral jurisdiction). The term "clearly identified" means the candidate's "name," "photograph" or "drawing," and where "the identity of the candidate is apparent by unambiguous reference" otherwise. See 2 U.S.C. § 431(18). As elaborated by an FEC regulation, "the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressmen,' or 'the incumbent'", or "through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for Senate in the State of Georgia'." See 11 C.F.R. § 100.29 (2002).

scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content."). Section 203 cannot bear that scrutiny.

A. Union and Corporate Speech About Matters of Public Concern Enjoys the Highest First Amendment Protection, and Restrictions Must Be Narrowly Tailored To Serve a Compelling Governmental Interest

Nearly 40 years ago this Court spoke of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Thus, "[s]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (interior quotation marks omitted). *See also Thornhill v. Alabama*, 310 U.S. 88, 101-04 (1940). In *Sullivan* itself, the Court applied that principle to protect the right to criticize public officials through the medium of a paid newspaper advertisement, "an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities." *Id.* at 266.

When this Court last reviewed a substantial rewriting of the Federal Election Campaign Act, it held that when speech on public issues dovetails with speech concerning elections, the First Amendment abides no limitation of the former. *See Buckley v. Valeo*, 424 U.S. 1, 42-44 (1976). FECA then limited, to $1,000 a year, spending on independent expenditures—by all persons, including unions and corporations—for "advocating the election or defeat of a candidate." See *id.* at 39-40. The Court held that this phrase was unconstitutionally vague, because "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in

practical application," as "[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions," "candidates campaign on the basis of their positions on public issues," and "campaigns themselves generate issues of public interest." *Id.* at 42 (footnote omitted). And, "'*[d]iscussions of those issues, as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.*'" *Id.* at 42 n.50 (emphasis added), quoting *Buckley v. Valeo*, 519 F.2d 817, 875 (D.C. Cir. 1975).

Buckley's crucial insight concerning the inextricable connection between issues and elections, the futility of regulating public speech on the basis of perceived "intent" or "effect," and [t]he compelling public interest, guaranteed by the First Amendment, in persons making and receiving commentary on candidates *because* they are candidates, and on issues *because* they are pertinent to an ongoing election, are now deeply embedded in the law and our political culture. "[T]he notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. '[D]ebate on the qualification of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges." *Republican Party of Minnesota v. White*, 536 U.S. 765, 781 (2002) (emphasis in original), quoting *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 222-23 (1989). *See also Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 686-87 (1989); *Buckley v. Valeo*, 424 U.S. at 14; *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971) ("the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office"); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

This Court has also repeatedly affirmed that where the speaker on matters of public concern is a labor union, a

corporation or some other organized group, no lesser or different First Amendment protection is at stake, for "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). In *Bellotti*, this Court invalided a criminal statute barring corporations from making contributions or expenditures in connection with ballot measures, because permitting such advocacy "afford[s] the public access to discussion, debate, and the dissemination of information and ideas." *Id.* at 783 (footnote omitted). *See also Pacific Gas & Electric Co. v. Public Utilities Comm.*, 475 U.S. 1, 8-9 (1986) (state cannot require corporation to include statements of citizens group in its newsletter to customers); *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530 (1980) (state cannot preclude corporation from including with customer bills its own newsletter that discusses public policy matters).[10]

B. The Primary Definition Is Not Narrowly Tailored

This Court has just once endorsed a governmental proscription of candidate-related speech by an entity regulated by § 203, upholding, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), a state's ban on the corpo-

[10] Precisely because "speech on matters of public concern needs 'breathing space' . . . in order to survive," *Nike, Inc. v. Kasky*, 123 S.Ct. 2554, 2565 (2003), (Breyer, J., dissenting), *quoting New York Times Co. v. Sullivan*, 376 U.S. at 272, Justice Breyer recently stated that where a corporation's regulable "purely commercial" speech is "inextricably intertwined" with "non-commercial" (public issue-oriented) speech, it must not be subject to state "false advertising" and related "unfair competition" regulation because that would chill corporations from "issu[ing] significant communications relevant to public debate" and "thereby limit the supply of relevant information available to those, such as journalists, who seek to keep the public informed about important issues." *Id.* at 2565-68 (interim quotation marks omitted). *See also id.* at 2558-59 (Stevens J., concurring).

rate financing of independent express advocacy expenditures. In doing so, the Court "emphasize[d]" that its decision turned only on "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" that "have little or no correlation to the public's support for the corporation's political ideas" and that, accordingly, renders corporate influence via independent expenditures "unfair[ ]" and regulable. *Id.* at 660.[11] *Austin* does not identify any other governmental interest that might be served by § 203, which only proscribes speech *other* than express advocacy, as the term "electioneering communication" does not include either an "expenditure" or an "independent expenditure" under FECA, see 2 U.S.C. § 434(f)(3)(B)(ii), which comprise the field of independent express advocacy speech. See 2 U.S.C. § 431(17); *FEC v. Massachusetts Citizens For Life, Inc.*, ("*MCFL*"), 479 U.S. 238, 248-49 (1986).

Even assuming that § 203's proscription of "electioneering communications" under the primary definition is aimed at serving the interests identified by the Court in *Austin*, it is not narrowly tailored to do so. First, insofar as the definition forecloses speech on matters of public concern that does not include express advocacy, *Buckley* and *MCFL* teach that, perforce, it is not narrowly tailored and is unconstitutional. We adopt the briefs of other plaintiffs on this point. Second, because § 203 necessarily reaches a wide variety of speech that is *not* election-related—whatever that means—or whose connection with an election is at most attenuated, it is not narrowly tailored because, as *Bellotti* demonstrates, a sub-

[11] This Court has recognized no other rationale for regulating independent expenditures, and has repeatedly rejected the notion that they either implicate corruption or its appearance, or could serve as conduits to circumvent contribution limits. See *FEC v. Colorado Republican Federal Campaign Committee ("Colorado II")*, 533 U.S. 431, 440-41 (2001); *FEC v. Nat'l Conservative Political Action Committee*, 470 U.S. 480, 490-501 (1985); *Buckley v. Valeo*, 424 U.S. at 39-58.

stantial amount of First Amendment-protected speech by corporations and unions is necessarily covered.

The Government and BCRA's congressional proponents claim that § 203 captures only broadcast advertising that comprises the virtual equivalent of express advocacy because speech that "refers" to a candidate within 30 days of a primary or convention, or 60 days before a general election, either must seek the candidate's election or defeat or have that effect. For that proposition they rely almost exclusively upon the *Buying Time* reports of the Brennan Center, which purport to analyze some ads broadcast during the 60 days preceding the 1998 and 2000 general elections. Plaintiffs' opening brief in No. 02-1674, *McConnell v. FEC*, demonstrates how these reports are deeply flawed and unreliable, and we rely on that analysis here. But regardless of those reports' empirical worth, and even if this Court decides that Congress could proscribe some union and corporate non-express advocacy speech whose "intent" or "effect" is electoral, § 203 is unconstitutionally overbroad because it necessarily sweeps in too much speech that the First Amendment protects.

By its very terms § 201 encompasses a substantial scope of protected speech. Any kind of "refer[ence]" to a candidate is included, even one that neither names nor visually depicts a candidate so long as it refers to the candidate's governmental position or candidacy status, or makes some other "unambiguous reference" to the candidate. See 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29 (2002). Nor does this reference have to have anything to do with the candidate's status *as* a candidate; any "reference" whatsoever to the individual that satisfies § 201(a)'s transmission, temporal and audience elements is proscribed, regardless of any other content or context. Indeed, that context may include the fact that the candidate is unopposed for reelection or faces only token opposition, rendering electoral considerations moot. And, we already know from the FEC's BCRA rulemaking that the

primary definition includes communications referring to the popular name of legislation that includes the name of a candidate; promoting a candidate's business; promoting a ballot initiative or referendum, even without a reference to a candidate; making public service announcements that include the candidate; and promoting local tourism with reference to the candidate. See Final Rule, "Electioneering Communications," 67 Fed. Reg. 65190, 65200-03 (Oct. 23, 2002).

The potentially limitless variety of broadcast messages that § 203 precludes includes, for example, communications that, as the record demonstrates:

- Call upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so;
- Inform the public, or express an opinion, about a Member of Congress's votes, legislative proposals or performance otherwise;
- Respond directly to a Member who has criticized the organization or taken issue with its activities or policies; or
- Encourage candidates to commit that, if elected, they will support or oppose particular legislation or policies.

The prohibition will have an even more startling impact when the President is a candidate for reelection, a situation that, of course, now exists. Beginning 30 days before the first primary or caucus—for the 2004 election that date is December 14, 2003, see www.vote-smart.org/election_president_state_primary_dates—§ 203 will criminalize broadcast references to the President in a series of geographic blackouts that will continuously ripple throughout the Nation, blocking every broadcast outlet, wherever located, whose signal can reach 50,000 persons in an upcoming primary or caucus state, until June 8, 2004.[12] See *id.* This blackout will

[12] Additional 30-day blackout periods will transpire from July 18 until the August 17, 2004 Wyoming caucus, and from July 25 until the August

become national in scope on July 31, thirty days before the August 30 - September 2 Republican National Convention, see www.fec.gov/press/20030630convention, and it will then continue without interruption throughout the remaining 60 days until the November 2 election. Thus, from July 31, 2004 until the election, it will be a crime for a union, corporation or incorporated non-profit organization to pay to broadcast any "refer[ence]" to the President, by "name," "photograph," "drawing" or other "unambiguous" means, anywhere in the United States.

It is very much to the point in this case that "[u]nions have traditionally aligned themselves with a wide range of social, political and ideological viewpoints," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), and they have always played a vital role in the public arena as advocates for both their members and all workers. *See generally Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-16 (Frankfurter, J., dissenting); [13] *United*

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24 Alaska primary. See www.vote-smart.org/election_president_state_primary_dates.

[13] Of the AFL-CIO itself and its predecessor, the AFL, Justice Frankfurter wrote over 40 years ago:

> American labor's initial role in shaping legislation dates back 130 years. With the coming of the AFL in 1886, labor on a national scale was committed not to act as a class party but to maintain a program of political action in furtherance of its industrial standards. . . . When one runs down the detailed list of national and international problems on which the AFL-CIO speaks, [t]he notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. And this Court accepts briefs as *amici* from the AFL-CIO on issues that cannot be called industrial, in any circumscribed sense. It is not true in life that political protection is irrelevant to and insulated from economic interests. It is not true for industry or finance. Nor is it true for labor.

Machinists v. Street, 367 U.S. at 812, 814-15 (Frankfurter, J., dissenting) (footnote omitted).

States v. United Auto Workers, 352 U.S. 567, 578-86 (1957); *United States v. CIO*, 335 U.S. 106, 115-21 (1948); *id.* at 143-46 (Rutledge, J., concurring).[14]

Thus, when unions engage in speech on matters of public concern, they "amplify[] the voice of their adherents." *Buckley*, 424 U.S. at 22. And, as we have shown the AFL-CIO's broadcast advocacy over a seven-year period has been a seamless year-in, year-out effort to shape the national issue agenda, encourage congressional action, engender public support for the labor movement's policy priorities, and influence debate during election periods to reflect worker concerns. This advocacy certainly might "affect," or be perceived to "affect," elections in the sense of influencing the electoral issue climate, forcing candidates to address union priority matters, informing the public and generating popular pressure on candidates to embrace particular policies. In turn, the labor movement's impact on public policy is only enhanced when electoral considerations motivate office-holders. But these are essential and inevitable aspects of "speech on matters of public concern."

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[14] In *Austin*, the Court determined that the ban on corporate independent expenditures, which did not apply to unincorporated labor organizations, was not fatally underinclusive for that reason because there are "crucial differences between unions and corporations," *id.* at 666, namely, unions do *not* partake of the "significant state-conferred advantages of the corporate structure," and while they "may be able to amass large treasuries" otherwise, "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury." *Id.* at 665-66.

The overbreadth doctrine affords recourse against a law that "may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Virginia v. Hicks*, 123 S.Ct. 2191, 2196 (2003). Those who "abstain from protected speech" "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation... harm[ ] not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id.* For that reason, the First Amendment does not permit a prohibition of *all* candidate-referential speech merely because *some* of that speech could be viewed, and might even be intended, to have an electoral impact. "[T]he argument . . . that protected speech may be banned as a means to ban unprotected speech . . . turns the First Amendment upside down. The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2003). Section 203, however, is predicated on just such an assumed "resembl[ance]," and even identity, between express advocacy and references to candidates in particular times and places. As we have shown, § 203's reliance upon a candidate reference as a proxy for express advocacy widely misses that mark.

In *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947 (1984), the Court held that an anti-fraud statute prohibiting a charity from paying fundraising expenses in an amount more than 25% of the amount raised was unconstitutionally overbroad, because this condition restricted First Amendment-protected solicitations yet encompassed charities that legitimately incurred high costs because they engaged in that protected conduct. "The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates

on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud." *Id.* at 965 (footnote omitted). So too here. Section 203's premise that *any* broadcast reference to a candidate, including, of course, an incumbent legislator, during certain times and to certain audiences, is an accurate measure of "electioneering" utterly fails to account for speakers who make such references in the course of First Amendment-protected non-electoral communications. *See also Erznoznik v. City of Jackson*, 422 U.S. 205 (1975); *United States v. National Treasury Employees Union*, 513 U.S. 454, 472-73 (1995); *United States v. Robel*, 389 U.S. 258, 262-66 (1967); *Thornhill v. Alabama*, 310 U.S. at 97-98. *Cf. Nike v. Kasky*, 123 S.Ct. at 2564-69 (Breyer, J., dissenting) (mixed commercial and public-issue speech cannot be subject to state false advertising laws.)

Finally, the overbreadth inquiry here cannot rise and fall on the limited experience of two 60-day periods,[15] irrespective of what the Brennan Center reports purported to conclude. The widespread use of paid broadcast advertising for non-public service messages is a relatively recent phenomenon, yet § 203 would ban a substantial amount of such advertising for all time in reliance upon only a fraction of even the experience to date. And, the novelty of these broadcasts lies only in their medium, not in their content, which falls well within the American tradition of freewheeling commentary on public affairs and public officials. Both experience, as the AFL-CIO and other plaintiffs have shown, and common sense advise that unions, corporations and other groups are likely to

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[15] Even defendants' studies did not review advertising proximate to primary elections, so there is no "empirical" evidence whatsoever regarding the 30-day ban. Yet "[f]ree discussion about candidates for public office is no less critical before a primary than before a general election." *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. at 223, especially in an era when redistricting has rendered party nominations for House seats tantamount to election in most districts. Nor do defendants' studies consider the 30-day period preceding national party conventions.

continue to broadcast a wide range of messages that include references to candidates, and that § 203 overbroadly restrains their ability to do so. *See generally Watchtower Bible & Tract Society v. Village of Stratton*, 536 U.S. 150, 167 (2002); *City of Houston v. Hill*, 482 U.S. 451, 465-66 (1987); *Erznoznik v. City of Jacksonville*, 422 U.S. at 213; *Lewis v. City of New Orleans*, 415 U.S. 130, 134 (1974). And, it is equally reasonable and pertinent to anticipate that Congress will take advantage of the broadcast silence imposed by § 203 to schedule particular legislation when those most affected are denied their preferred medium to respond swiftly and effectively. Section 203 both suppresses essential speech and facilitates official mischief and should be struck down.

II. BCRA'S BACKUP DEFINITION OF "ELECTIONEERING COMMUNICATION" IS UNCONSTITUTIONALLY VAGUE, AND NEITHER OF ITS PRINCIPAL CLAUSES IS SEVERABLE

BCRA § 201(a) alternatively provides a backup definition of "electioneering communication," codified at 2 U.S.C. § 434(f)(3)(A)(ii), that is to apply in the event that the primary definition discussed above "is held to be constitutionally insufficient by final judicial decision. . . ." The backup definition includes any "broadcast, cable or satellite communication" that (1) "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)" "and" (2) "is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." Unlike the primary definition, the backup definition entails no temporal or audience restriction; it applies to *all broadcasts, any time, anywhere*. And, under FECA, "candidate[s]" include virtually all incumbent Representatives and Senators at all times, first-term Presidents and Vice Presidents during

substantial periods of time, and Vice Presidents whenever they run for President.[16]

Since the backup definition, like the primary definition, on its face eschews any limitation to express advocacy, Judge Henderson correctly concluded that the backup definition is unconstitutional. See S.A. 362sa. If this Court reaffirms its prior holdings that Congress may not proscribe corporations and unions from undertaking non-express advocacy communications to the general public on matters of public concern, then it must similarly strike down the backup definition. But, even if the Court finds that its earlier decisions on these matters are not controlling, the backup definition should be struck down as impermissibly vague and overbroad.

A. The Second Prong of the Backup Definition Is Unconstitutionally Vague

This Court has explained that "[i]t is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined," for "where a vague statute abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) (footnotes and citations omitted). Moreover, "adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal" is particularly important in a

[16] A person becomes a "candidate" within the meaning of FECA, for example, upon receiving contributions in excess of $5,000, 2 U.S.C. § 431(2)(A), a threshold routinely met by incumbent Members of Congress almost immediately after winning their most recent election. See also 11 C.F.R. § 100.3. As a practical matter, only a Member who has announced his or her retirement or has lost a nomination contest is not a "candidate."

criminal statute, *Buckley*, 424 U.S. at 77, and "where First Amendment rights are involved, an even greater degree of specificity is required." *Id.* (interior quotation marks omitted). *See also Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

Judge Leon, joined by Judge Kollar-Kotelly, see S.A. 885sa-86sa, correctly determined that the phrase "suggestive of no plausible meaning other than an exhortation to vote" was unconstitutionally vague because it "depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the campaign, the timing of the ad, and the issues with which the candidates are identified." See S.A. 1164sa (footnote omitted). Additionally, the subsequent language "for or against a specific candidate," unlike the phrase "refers to a clearly identified candidate" in the primary definition, both is undefined and entails no requirement that the communication itself name or otherwise unambiguously refer to a candidate; instead, it admits the possibility that a viewer or listener, again solely as a subjective function of context, might independently conjure up the thought of a candidate.[17] Because this prong of the

[17] In *Buckley*, this Court approvingly equated to express advocacy the clarity of the statutory phrase "clearly identified" (then in FECA § 608(e)(2)), because it required "an explicit and unambiguous reference to the candidate . . . as part of the communication." 424 U.S. at 43 (footnote omitted). That observation strongly suggests that statutory terms defining prohibited communications that encompass less direct references to a candidate are unconstitutionally vague. If so, the backup definition plainly falls short, for it variously uses the formulation "candidate for that office" (and the phrase "that office" has no certain previous referent in the statute); "candidate," with no qualifier, which also appears in new 2 U.S.C. § 431(20)(A)(iii); and "specific candidate," a formulation not otherwise found in FECA, and which presumably differs, somehow, from both "candidate" and "refers to a clearly identified candidate". (The latter formulation, approved in *Buckley*, appears in both the primary definition, at 2 U.S.C. § 434(f)(3)(A)(1)(I), and in 2 U.S.C. § 431(20)(A)(iii).)

backup definition does not solely rely upon the text of a communication, a person's concern that a court might find that his speech is "suggestive" of only one "plausible"—express electoral advocacy—meaning, unacceptably "'puts the speaker wholly at the mercy of the varied understanding of his hearers,'" "'blankets with uncertainly whatever may be said,'" and "'compels the speaker to hedge and trim.'" *Buckley*, 424 U.S. at 43, *quoting Thomas v. Collins*, 323 U.S. 516, 535 (1945).

Moreover, BCRA defines neither of the key terms "suggestive" and "plausible", and their ordinary definitions palpably demonstrate their imprecision. The word "suggestive" means "[t]ending to suggest thoughts or ideas" or "[c]onveying a suggestion or hint." Webster II New College Dictionary (1999: Houghton Mifflin Co., Boston, MA) ("*Webster*"). The word "plausible" means "[s]eemingly or apparently valid, likely, or acceptable." *Id.* Plainly, both "suggestive" and "plausible" leave much to the subjective imagination. *Cf. Hynes v. Mayor of Oradell*, 425 U.S. 610, 622 (1976) (invalidating a municipal ordinance requiring persons to give advance notice of door-to-door canvassing for a "recognized charitable cause" or a "political . . . cause" because, *inter alia*, those terms are unconstitutionally vague). And, the final phrase "exhortation to vote for or against" is also undefined in the statute and is hardly distinguishable from the phrase "advocating the election or defeat," which, as noted earlier, *Buckley* held to be unconstitutionally vague.[18]

[18] A Lexis search reveals that each of these BCRA terms is either unique or virtually unique in the United States Code. Neither "exhortation" nor "exhort" appears at all. "Suggestive" appears but once, in the phrase "injuries suggestive of rape and sexual assault." See 42 U.S.C. § 3796gg. And "plausible" appears only in the phrases "plausible biological mechanism", see 38 U.S.C. §§ 1116 and 1117, and "plausible deniability." See 50 U.S.C. § 2301. None of these usages concerns the nature or meaning of language or communications.

B. The First Prong of the Backup Definition Is Unconstitutionally Vague

The key language of the first prong of the backup definition "promotes or supports a candidate . . . or attacks or opposes a candidate"—is also unconstitutionally vague. BCRA defines none of these terms, and they too have no precise meanings. Thus, "promote" can mean "contribute to the progress or growth of" or "attempt to sell or popularize by advertising." *Webster*. "Support" can mean "aid the cause of by approving, favoring or advocating." *Id.* "Attack" can mean "criticize strongly or in a hostile manner." *Id.* And, "oppose" can mean "be in conflict or contention with"; "be in disagreement with or resistant to"; "place in opposition or be in opposition to"; or "act or be in opposition to." *Id.*

Moreover, the "promote or support. . ." prong inherently invites the same examination of an ad's context that Judge Leon correctly found fatal to the "suggestive of no plausible meaning. . ." prong. Thus, the communication need not even refer to the candidate if its context might somehow remind the viewers or listeners about the candidate. Yet even, for example, an advertisement's request that viewers or listeners contact a *named* candidate might be considered "promoting" or "opposing" the candidate if viewers were called upon to ask the candidate to oppose legislation with which he or she is identified as a sponsor; the candidate's position on the matter at issue was both firmly held and widely known, so the "call" request in the ad reminded viewers of that position; or the bill or issue cited was central to an ongoing campaign, so raising it in the context of a "call" request underscored the issue to the candidate's benefit or detriment. Given these entirely ordinary scenarios, a would-be speaker could not be confident that even a "call" ad would pass muster.

Judge Leon, again joined by Judge Kollar-Kotelly, see S.A. 885sa-86sa, concluded below, however, that this prong is not unconstitutionally vague, declaring simply that "a person of ordinary intelligence would understand what is prohibited"

because "one need only conclude, in effect, that the ad is *not* neutral as to both candidates for it to have satisfied the backup definition" (emphasis in original).[19] See S.A. 1163sa. But, what does "not neutral" mean? Judge Leon elaborated with an AFL-CIO advertisement entitled "No Two Way," which discussed a Representative in his or her legislative capacity and that, Judge Leon concluded, "was not neutral as to a federal candidate, as it attacks his or her position on the federal budget." See S.A. 1163sa. And, Judge Leon's examples of what he classified as permissible "[g]enuine [i]ssue [a]dvertisements" and impermissible "[c]andidate-[c]entered [i]ssue [a]dvertisements"—all of which are ads broadcast by the AFL-CIO—provide no clearer guidance. See S.A. 1165sa, 1372sa-79sa.

Whatever "not neutral" may mean, Judge Leon's construction plainly would preclude a union, business corporation, or incorporated non-profit group from broadcasting anything anywhere at any time that conveyed any of a substantial range of non-electorally referential opinions about the actions and qualities of any individual who is a "candidate"—including, as we have shown, virtually every incumbent Senator and Representative at virtually all times, and an incumbent President for a substantial period of time. In fact, from May 16, 2003, when President Bush legally became a candidate for reelection, see *Washington Post*, p. A1 (May 17, 2003), until May 19, when the district court stayed its May 2 decision below, it was a federal crime for a union, corporation or incorporated non-profit organization to broadcast anything

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[19] Nonetheless, Judge Leon's certitude on this point was apparently short-lived; on May 19, he declared that a stay of the court's May 2 judgment invalidating the primary definition was warranted because "the FEC's unfortunate failure to promulgate regulations for the backup definition, as it did for the primary definition, has sufficiently deprived the parties of guidance regarding the contours of the backup definition." Memorandum Opinion, at 3 (May 19, 2003) (Leon, J., dissenting in part and concurring in part) (footnote omitted).

that was "not neutral" about the President, irrespective of its subject matter or its urgency to a policy or legislative goal of the organization. Such overbreadth is an unacceptable cure for vagueness. *Cf. Buckley*, 424 U.S. at 44-47 (construing FECA §608(e)(1) to reach only express advocacy but then invalidating its limit on independent expenditures because it "severely restricts all independent advocacy despite its substantially diminished potential for abuse").

Notably, in its BCRA rulemaking, the FEC declined to adopt numerous exceptions to the primary definition of "electioneering communication" because 2 U.S.C. §§ 434(f)(2)(B)(iv) bars a regulatory exception for any communication that "promotes," "supports," "attacks" or "opposes" a candidate, and the FEC concluded that virtually *any* reference to a candidate might be so considered. See Final Rule, "Electioneering Communications," 67 Fed. Reg. at 65200-03. And, in this same rulemaking, the defendant-intervenors urged the FEC not to include the "promotes or supports. . ." phrase in any exception because it was "subjective" and would "create[ ] uncertainty about whether a communication will be covered by the law." Detailed Comments of BCRA Sponsors Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe and Senator James Jeffords, at 8, 6 (August 23, 2002). www.fec.gov/pdf/nprm/electioneering_comm/comments/us_cong_members.pdf.[20] Certainly, if this phrase cannot provide sufficient clarity in an *exception* to the primary definition of "electioneering

[20] In the same vein, principal BCRA sponsor and defendant-intervenor Senator McCain urged the defeat of an amendment to his bill proposed by Senator Bingaman that would have afforded a "clearly identified candidate" who was "attack[ed] or oppose[d]" by a person in any broadcast an opportunity, without charge, to respond on the same broadcast station, because, in part, "[i]t is very difficult to define what a negative ad is" that the amendment would cover. See 147 Cong. Rec. S3114 (daily ed., March 29, 2001).

communication," then it is unconstitutionally vague as an explicit *component* of the backup definition itself.

C. The Backup Definition Is Not Severable

Even if the majority below was correct that the first prong of the backup definition is sufficiently clear, its decision to save that prong by severing it from the second prong, which it acknowledged was unconstitutionally vague, see S.A. 1165sa (Leon, J.), was wrong for two reasons.

First, the legislative history[21] of BCRA makes evident that Congress's highly unusual enactment of a backup definition of a statutory term was the product of a legislative compromise intended to ensure that one of these particular formulations would survive constitutional challenge intact, and not that a mere fragment of either would remain. As introduced, the original Senate bill contained only what is now the primary definition of "electioneering communication." See S. 27, Section 201, 107th Cong., 1st Sess. (2001). Senator Specter initially offered an amendment to incorporate in that definition both the "promotes or supports. . ." clause as it now appears in the backup definition and the clause "when read as a whole, and in the context of external events, is unmistakable, unambiguous and suggestive of no plausible meaning other than an exhortation to vote for

[21] The question of severability requires "essentially an inquiry into legislative intent." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1995). Although BCRA contains a severability clause, Section 401, providing that if any "provision" or "amendment," or the "application" of either, to "any person or circumstance" is "held to be unconstitutional," the "remainder" of the act and its "application . . . to any person or circumstance, shall not be affected," a severability clause "'is an aid merely; not an inexorable command,'" *Reno v. American Civil Liberties Union*, 521 U.S. 844, 885 n.49 (1997), *quoting Dorchy v. Kansas*, 264 U.S. 286, 290 (1924), because "separation-of powers concerns" compel courts to steer clear of engaging in legislative conduct or rewriting laws. *Reno*, 521 U.S. at 884-85 and n.50. *See also United States v. Jackson*, 390 U.S. 570, 586 n.27 (1968).

or against a specific candidate." See Amendment No. 140, 147 Cong. Rec. S2700, S2704 (daily ed., March 22, 2001). Senator Specter explained that he drew the first clause from "language...existing in McCain-Feingold" (in what is now 2 U.S.C. § 431(20)(A)(iii)) and the second clause from *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), and that he offered the amendment because he feared that, without them, the definition in the bill was highly vulnerable to invalidation under *Buckley*. See 147 Cong. Rec. at S2706.

In the ensuing debate, Senators Thompson, Biden and Snowe (one of the two co-authors of the primary definition) stressed the importance of maintaining a bright-line definition of "electioneering communication." *Id.* at S2708-12. Senator Specter responded by offering to convert his amendment from a modification of the definition to a separate, *alternative* definition: "to put in the 'or', the disjunctive instead of 'and', the conjunctive so that there is severability. And where one is decided to be inefficient [sic] to satisfy the vagueness standards of Buckley, the other might be sufficient—picking up on what [Senator Biden] said, having the safeguard." *Id.* at S2712. It was this alternative that was ultimately enacted as the backup definition. See *id.* at S3119-20, S3122-23.

Thus, the explicit legislative compromise was an either-or pairing of two palatable definitions of "electioneering communication"—the primary definition and the backup definition. The Court should refrain from severing either prong of the backup definition from the other if it finds either to be unlawful, for "drawing one or more lines between categories of speech covered by an overly broad statute . . . involves a . . . serious invasion of the legislative domain." *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n.26 (1995). *See also Reno v. American Civil Liberties Union*, 521 U.S. at 884-85.

Second, by severing the first prong after invalidating the second, the majority below adopted a definition of "electioneering communication" that, whatever its actual scope, is undeniably a significantly broader prohibition than *either* the full backup definition *or* the primary definition, and it simply cannot be concluded that Congress intended that result. *Cf. Frost v. Corporation Commission of Oklahoma*, 278 U.S. 515, 525 (1929) (when an "excepting proviso is found unconstitutional the substantive provisions which it qualifies cannot stand," because "to hold otherwise would be to extend the scope of the law...so as to embrace [circumstances] which the legislature passing the statute had, by its very terms, expressly excluded").

Accordingly, if this Court determines that either prong of the backup definition is unconstitutional, then the entire definition should be held non-severable and void.

III. BCRA'S COORDINATION PROVISIONS ARE UNCONSTITUTIONALLY VAGUE AND OVERBROAD.

A. BCRA's Coordination Provisions Directly Regulate Protected Speech and Associational Activities.

All three judges below correctly recognized that BCRA's definition of coordination must be narrowly and clearly drawn in order to avoid interfering with First Amendment rights. S.A. 143sa (Per Curiam), 386sa-387sa (Henderson, J.). In holding that the FEC could not define coordination to include all expenditures by political party committees in support of their candidates, the Court recognized that the definition of coordination implicates both freedom of speech and freedom of association because it determines whether communications are fully protected as independent expenditures or are subject to the lesser degree of constitutional protection afforded to contributions. *See Colorado Republican Federal Campaign Comm. v. Federal Election Commission*, 518 U.S. 604, 615-16, 619-22 (1996) ("*Colorado I*"). Moreover, insofar as the definition of "coordination" depends on a speaker's contacts with his elected

representatives and candidates, it implicates the fundamental right of citizens "to make their wishes known to their representatives." *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). *See also United States v. Harriss*, 347 U.S. 612, 635 (1954) (Jackson, J. dissenting). And, insofar as the definition of "coordination" depends on the contacts between a speaker and a political party, it implicates the equally fundamental right "to associate with the political party of one's choice." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). *See also Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. at 224; *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986).

BCRA's coordination provisions not only implicate First Amendment rights by limiting freedom of speech, freedom of association and the right to petition the government, they also threaten these rights by intruding into highly sensitive private political activities which are at "'the very heart of the organism which the first amendment was intended to nurture and protect.'" *AFL-CIO v. Federal Election Commission*, F.3d 168, 179 (D.C. Cir. 2003), quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir.), *cert denied*, 454 U.S. 897 (1981). By definition, enforcement of coordination rules "'inevitably . . . involves an intrusive and constitutionally troubling investigation of the inner workings of political [actors].'" *Colorado II*, 533 U.S. at 471 n.3 (Thomas, J., dissenting, quoting with approval from Brief for American Civil Liberties Union, *et. al.* as *Amici Curiae* 18). See *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963); *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (Frankfurter, J. concurring). As Judge Henderson put it in her dissenting opinion, "in the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in lobbying or speech activities." S.A. 387sa.[22]

In the late 1990's, three lower courts attempted to limit the chilling effect of FEC's omnibus coordination investigations by narrowing the definition of coordinated political activities. See *Clifton v. Federal Election Commission*, 114 F. 3d 1309 (1st Cir. 1997), *cert denied*, 522 U.S. 1108 (1998); *Federal Election Commission v. Public Citizen, Inc.*, 64 F. Supp. 2d 1327 (N.D. Ga. 1999), *rev'd on other grounds*, 268 F.3d 1283 (11th Cir. 2001); *Federal Election Commission v. Christian Coalition, Inc.*, 52 F. Supp. 2d 45 (D.D.C. 1999). Responding to the direction given in these decisions, and noting that "[t]he statutory terms are not inherently clear, nor

[22] The record amply supports Judge Henderson's conclusion regarding the "crippling" and intrusive impact of coordination investigations. In one leading coordination case brought against the Christian Coalition, the FEC conducted extensive discovery into the inner workings of the organization as well as private discussions between the leaders of the organization and numerous public officials. *See Federal Election Commission v. Christian Coalition, Inc.*, 52 F. Supp. 2d 45 (D.D.C. 1999). In another major enforcement case involving a coalition of business organizations, including the Chamber of Commerce and the National Association of Manufacturers, the Commission conducted a "disruptive, burdensome and expensive" investigation, S.A. 284sa, involving "four years of extensive discovery," S.A. 283sa, in order to determine whether lobbying meetings between business lobbyists and Congressional staff members were used to coordinate broadcast advertisements run during the 1996 election cycle. And, in a far-ranging, four-year investigation of the AFL-CIO's campaign and lobbying activities during the 1995-96 election cycle initiated by the organization's political opponents, the Commission's investigators sought evidence from more than 150 respondents and third-party witnesses, including the White House, the Clinton/Gore '96 Campaign, and 100 Members of Congress, and subpoenaed more than 50,000 pages of "extraordinarily sensitive political information [including] plans and strategies for winning elections, materials detailing political and associational activities, and personal information concerning hundreds of employees, volunteers and members of the Plaintiff organizations." *AFL-CIO v. Federal Election Commission*, 177 F. Supp. 2d 48, 51 (D.D.C. 2001), *aff'd*, 333 F.3d 168 (D.C.Cir. 2003).

does the Act's legislative history provide much guidance," the FEC on December 6, 2000 issued regulations intended to "fill what is largely a vacuum in this area." Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. 76138, 76141 (Dec. 6, 2000), adopting 11 C.F.R. § 100.23 (2001). BCRA, however, reinstates the open-ended standards that were in effect prior to the courts' decisions and the 2000 regulations, once again raising serious impediments to the free speech and associational rights of all citizens.

B. BCRA's Provisions Regulating Coordinated Electioneering Communications And Expenditures Are Vague And Overbroad.

BCRA §214(a)(2) does not use the word "coordination" at all,[23] but provides instead that expenditures made by any person, other than a candidate or candidate's authorized committee, "in cooperation, consultation or concert with, or at the request or suggestion of" a political party committee shall be considered to be contributions made to such party. See 2 U.S.C. § 441a(a)(7)(B)(ii). This language offers no clear guidance to political actors and the agencies charged with enforcing the campaign finance laws. Does a political party "request or suggest" expenditures by third parties when a party official publicly identifies the party's principal

[23] BCRA § 202 provides that if any person makes or contracts to make any disbursement for any electioneering communication and such disbursement is "coordinated with" a candidate or political party, the disbursement or contracting shall be treated as a contribution to the candidate supported by the electioneering communication or that candidate's party. 2 U.S.C. § 441a(a)(7)(C). The Court need not consider whether § 202's bare reference to "coordination" is constitutionally adequate because the FEC regulations issued under BCRA apply the same standards for coordinated electioneering communications under § 202 as they apply to other coordinated communications under § 214(a)(2). See 11 C.F.R. § 109.21(c)(1).

campaign themes and the states where the party hopes to prevail? Is the result different if the same message is delivered in a "private" strategy session, and, if so, how many party activists must be present before a meeting loses its private character? Has a union official acted "in cooperation . . . or concert with" a political party if he meets with the party's congressional leadership to plan strategy in support of the party's legislative agenda, including union expenditures in support of that agenda? If a trade association lobbyist participates in planning party activities during the early stages of a campaign season, will the use of information she has learned about the party's plans turn all of her group's subsequent independent expenditures into contributions because of improper "consultation"? These are only a few of the myriad unanswered questions raised by § 214(a)(2)'s expansive and unclear language, the uncertainty and breadth of which pose a substantial risk of deterring legitimate involvement of citizens in political parties.

The two judges below who voted to uphold §§ 202 and 214(a)(2) did not attempt to show that the statutory language is clear and narrowly drawn; indeed, the majority ignored the statutory language completely. Instead, the majority rejected plaintiffs' challenge to the scope of § 202 by reference to its analysis of § 214(a)(2), see S.A. 130sa, and it rejected the vagueness challenge to § 214(a)(2) in part on the dubious ground that the same language has long appeared in FECA's provision relating to coordination with candidates, 2 U.S.C. § 441a(a)(7)(B)(i).[24] S.A. 135sa-136sa, 137sa. The fact that

[24] The majority below erroneously suggested that the Court approved the language of 2 U.S.C. § 441a(a)(7)(B)(i) in *Buckley v. Valeo*. S.A. 138sa-140sa. There, the Court located the coordination principle in FECA § 608(c)(2)(B), which then provided that expenditures "made by or on behalf of" any candidate were to be treated as expenditures of the candidate and contributions by the person or group making the expenditures, see 424 U.S. at 47 n.53, and further provided that expenditures are to be treated as "made by or on behalf of any candidate" if they are

statutory language is longstanding does not in itself mean that the language is clear or that it provides adequate guidance to those who must adhere to its mandate. See *Colorado II*, 533 U.S. at 472 (Thomas, J., dissenting) ("we have never before upheld a limitation on speech simply because speakers have coped with the limitation for 30 years"). The parallel language in FECA might be relevant *if* the FEC or the courts had rendered interpretations which narrowed the statute's scope and made its language more clear. However, the FEC itself recognized as late as 2000 that "[t]he statutory terms [of FECA's coordination provision] are not inherently clear," Final Rule, "General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures," 65 Fed. Reg. at 76141, and the agency's effort to narrow the statutory language at that time has been repealed by BCRA § 214(b), itself. See Pub. L.107-155, § 214(b), 116 Stat.81, 94-95 (2002). While the majority in *Colorado II* did not address the question, the four dissenters stated clearly that FECA's definition of coordinated expenditures is unconstitutionally overbroad. See 533 U.S. at 467-468 (Thomas, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, JJ.) (2 U.S.C. § 441a(a)(7)(B)(i)

"*authorized or requested* by the candidate, an authorized committee of the candidate, or an agent of the candidate." 18 U.S.C. § 608(c)(2)(B), reprinted at 424 U.S. 191 (emphasis added). Whether or not the Court actually "upheld" this provision, as suggested by the majority below, see S.A. 139sa, is of no consequence here because the "authorized or requested" language of the 1974 statute is far more restrictive than the "in cooperation, consultation, or concert with" language adopted by Congress following *Buckley* and now repeated in BCRA § 214(a)(2). Similarly, the Court's interpretation of § 608(c)(2)(B), based on its legislative history, as "operat[ing] to treat all expenditures placed *in cooperation with or with the consent of* a candidate, his agents, or an authorized committee of the candidate as contributions subject to the limits set forth in [FECA]," 424 U.S. at 47 n.53 (emphasis added), offers no support for the broader standard at issue here, which allows coordination to be found on the basis of mere "consultation" with a candidate or political party committee.

"covers a broad array of conduct, some of which is akin to an independent expenditure"); *id.* at 471 ("because of the ambiguity in the term 'coordinated expenditure,' the Party Expenditure Provision chills permissible speech as well").

C. The Majority Below Erroneously Relied On The "Possibility" of Corrective Regulations In Rejecting The Vagueness And Overbreadth Challenges to BCRA's Coordination Provisions

Rather than considering the language of §§ 202 and 214(a)(2), the majority below also rejected plaintiffs' vagueness challenges as not ripe for consideration because the issuance of final FEC regulations while the case was *sub judice* made it "possible that many, perhaps even all, of Plaintiffs' vagueness concerns have been remedied by the regulations' contents." S.A. 137sa. However, it is no answer to a claim that a statute is unconstitutionally vague and overbroad that an administrative regulation might "possibly" cure the constitutional defects as long as citizens may be subject to penalties under the statute. See *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 371, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden."). This is the case here because the statute provides separate criminal penalties, enforceable by the Department of Justice, for knowing and willful violations of "the Act." *E.g.*, 2 U.S.C. § 437g(d). The only way that the FEC regulations defining coordination could cure the vagueness and overbreadth of the statute would be if the regulations provide a clear and narrowly drawn safe harbor for coordinated activities that prevents any possible criminal prosecution under the vague and overbroad statutory terms. While the majority relied on 2 U.S.C. § 438(e) for the proposition that "FECA also provides protection for those who act in good faith reliance on FEC regulations," S.A. 136sa n.88, that provision is only relevant to the extent that the coordination regulations in fact provide "protection" from

criminal prosecutions under the statute, which cannot possibly be determined without reviewing the regulations themselves.[25]

In refusing to consider the FEC's coordination regulations issued in response to BCRA, the majority erroneously relied on BCRA § 403, which limits the jurisdiction of the three-judge court to constitutional challenges to BCRA. S.A. 138sa. For, it is well-established that a three-judge court has pendent jurisdiction to decide any other claim properly presented in a case even though the claim is one that standing alone would require only a single district judge. See *Philbrook v. Glodgett*, 421 U.S. 707, 712 (1975); *Hagans v. Lavine*, 415 U.S. 528, 543 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504 n. 5 (1972). Here, moreover, plaintiffs raised no claim against the FEC regulations, which became relevant, if at all, only as a defense to their constitutional claims against the statute. Even if the three-judge court lacked jurisdiction to invalidate the FEC regulations themselves, the court was not prohibited from considering whether the regulations cured the constitutional flaws in BCRA's coordination provisions. By relegating consideration of the regulations to a single-judge court in a separate action in which the constitutionality of BCRA's coordination provisions could not be addressed, the majority awkwardly bifurcated the coordination issues and ignored Congress' mandate that the courts should "expedite to the greatest possible extent the disposition of the action and

[25] This is the approach followed by the majority below itself in considering the advance disclosure requirement set forth in BCRA § 201(a), where they found that the constitutional infirmity in the statute was not cured by the regulation and therefore held that the advance notice requirement in the statute should be struck down. S.A. 109sa-111sa and n.73. *Cf.* S.A. 132sa-133sa (refusing to address the constitutionality of BCRA § 212 because, in the majority's view, the FEC's regulation cured any infirmity in the statute).

appeal" in this case. Pub. L. 107-155, §403(a)(4), 116 Stat.114 (2002).

Finally, even a cursory examination would have demonstrated that the FEC regulations fail to narrow the statutes' coordination provisions sufficiently to save their constitutionality. For example, in defining the term "coordinated," the FEC regulations repeat *verbatim* the vague and overbroad language of BCRA § 214(a)(2), see 11 C.F.R. § 109.20(a); to the extent that this provision may be applicable,[26] it does nothing to clarify or narrow the statutory language. The regulations' definition of "coordinated communication" similarly repeats the vague statutory words "request or suggestion", 11 C.F.R. §109.21(d)(1)(i); and, the FEC explicitly refused to define the term further. See Final Rule, "Coordinated and Independent Expenditures," 68 Fed. Reg. 421, 431 (rejecting commenters' request for further definition of the term "suggest"). To the extent that the statute impermissibly permits a finding of coordination where a speaker merely informs a candidate or political party committee of its own independent plans, the regulation fails to cure this infirmity and actually reinforces it. See 11 C.F.R. § 109.21(d)(3) (providing that the regulations' conduct standards may be met by "substantial discussion"). Fourth, and most significantly, the FEC regulations do not protect contacts with legislators undertaken for a lobbying purpose.[27]

[26] The relationship between the broadly worded definition of "coordinated" in 11 C.F.R. § 109.20 and the definition of "coordinated communication" in 11 C.F.R. § 109.21 is uncertain. The regulations appear to contemplate, however, that § 109.20(a) could be applied at least in some instances not covered by § 109.21. The majority in the district court did not consider the implications of § 109.20(a) to this case.

[27] 11 C.F.R. § 109.21(f), which provides a "safe harbor" for a candidate's or a party committee's responses to an inquiry about that candidate's or committee's positions on legislative or policy issues, does not protect the vast majority of legitimate contacts between outsiders and legislators and party committees on legislative and policy matters, as

For these reasons, it was critical for the majority below to consider the FEC's regulations in detail and its failure to do so was reversible error.

D. The Majority Erroneously Determined That "Agreement or Formal Collaboration" Is Not A Constitutionally Required Element of Coordination.

Although the majority below refused to consider the plaintiffs' overall vagueness and overbreadth challenges to BCRA §§ 202 and 214(a)(2) because of the possible impact of the FEC's coordination regulations, it did address whether the statutes are overbroad in light of BCRA § 214(c), which prohibits the agency from adopting any regulation requiring "agreement or formal collaboration" as an element of coordination.[28] S.A. 138sa-143sa. In ruling that "agreement or formal collaboration" is not a constitutionally required element of coordination, the majority incorrectly relied on this Court's decisions in *Buckley*, *Colorado I* and *Colorado II*,[29] which, while not deciding the question definitively,

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suggested by the majority below. S.A. 152sa. The FEC rejected several proposals to narrow the regulations in order to make certain that they do not prohibit contacts with legislators and committees on legislative and policy matters. See 68 Fed. Reg. at 441.

[28] This question was clearly ripe for decision since BCRA § 214(c) leaves the FEC with no discretion to ignore Congress's mandate. As required by Congress, the regulations issued by the FEC state that "[a]greement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication, his or her authorized committee, his or her opponent, or the opponent's authorized committee, a political party committee, or an agent of any of the foregoing, is not required for a communication to be a coordinated communication." 11 C.F.R. § 109.21(e). *See* also 11 C.F.R. § 109.21(d).

[29] Although the majority below also relied on the district court's decision in *Christian Coalition*, the opinion in that case offers no support for the conclusion that expenditures may be found to be coordinated without proof of "agreement or formal collaboration," for the court explicitly stated that "a spender should not be deemed to forfeit First

strongly suggest that the element of "agreement or formal collaboration" is essential to keeping the concept of coordination within constitutional bounds. Furthermore, without proof of "agreement or formal collaboration," the statutory provisions clearly reach a broad range of conduct, including mere consultation with a candidate or party, which is constitutionally protected.

In *Buckley*, the Court located the coordination principle in FECA § 608(c)(2)(B), the now-repealed provision which applied to any expenditure that was "authorized or requested" by a candidate, words that indicate that an element of agreement between the speaker and the candidate must be present. The Court's explanation for the coordination rule—that it is necessary "to prevent attempts to circumvent the Act['s contribution limits] through *prearranged* or coordinated expenditures amounting to disguised contributions," 424 U.S. at 47 (emphasis added)—also indicates that some form of agreement is necessary before an expenditure will subject a political speaker to civil and criminal penalties. Chief Justice Burger, concurring in part and dissenting in part, similarly emphasized the "authorized or requested" language of FECA § 608(c)(2)(B), although he noted that the Act "places intolerable pressure on the distinction between 'authorized' and 'unauthorized' expenditures on behalf of a candidate," *id.* at 252, and he expressed doubt "that the distinction can be maintained." *Id.* Justice White, in his separate opinion dissenting from the Court's invalidation of FECA's limits on independent expenditures, similarly made clear his understanding that coordinated expenditures under §608(c)(2)(B) were those made "at [a candidate's] request or with his approval or cooperation." *Id.* at 261.

Amendment protections for her own speech merely by having engaged in some *consultations* . . . with a federal candidate," see 52 F. Supp. 2d at 91 (emphasis added), and it stated that coordination only may be found to exist where "the candidate and spender emerge as *partners or joint venturers* in the expressive expenditure." See *id.* at 92 (emphasis added).

In *Colorado I*, the plurality opinion held that FECA's dollar limits on political party expenditures made "in connection with" the election campaign of a candidate for federal office, 2 U.S.C. § 441a(d)(3), could not be constitutionally applied to "an expenditure that the political party has made independently, without coordination with any candidate." 518 U.S. at 608. Since the case involved a challenge to FECA's party contribution limits as applied to specific expenditures by the Colorado Republican Party, *id.* at 613, the Court had no occasion to consider whether FECA's definition of coordinated expenditures was facially overbroad or vague.[30] See *id.* at 623-24. Moreover, with respect to the specific expenditures involved, there was little doubt that they were "independent" and not "coordinated" because no Republican candidate had been selected to run at the time of the party's expenditures criticizing the incumbent Democrat. *Id.* at 613-14. *See also Colorado II*, 533 U.S. at 439. In rejecting the FEC's reliance on "general descriptions of party practice . . . that do not refer to the advertising campaign at issue here or to its preparation," 518 U.S. at 614, the plurality indicated, however, that such general evidence could not cast significant doubt upon uncontroverted direct evidence that the campaign was developed by the party "independently and not pursuant to any general or particular *understanding* with a candidate." *Id.* (emphasis added). The Court's reference to "any general or particular understanding" is suggestive that

[30] Justice Kennedy, joined by the Chief Justice and Justice Scalia, would have reached the constitutionality of FECA's limits on coordinated party expenditures, see 518 U.S. at 627, as would have Justice Thomas, joined by the Chief Justice and Justice Scalia. See *id.* at 631. Neither of these opinions addressed the facial invalidity of FECA's definition of coordination with candidates. Justice Thomas, however, warned of the dangers created by the coordinated expenditure rules which "leav[e] political parties in a state of uncertainty about the types of First Amendment expression in which they are free to engage." See *id.* at 634.

some form of "agreement" is constitutionally required before an expenditure may be treated as a "disguised contribution."

Finally, in *Colorado II*, the Court reached the question, left open in *Colorado I*, of whether FECA's party expenditure provision was "facially unconstitutional, and so...incapable of reaching party spending even when coordinated with a candidate." 533 U.S. at 440. Because the plaintiffs made no effort to distinguish between different kinds of coordinated expenditures, *id.* at 456 n.17, the majority opinion was not called upon to decide what kinds of conduct would constitute coordination if it upheld the statute. The Court did, however, cite with approval *Buckley*'s observation that "treating coordinated expenditures as contributions 'prevent[s] attempts to circumvent the Act through prearranged or coordinated expenditures amounting to disguised contributions.'" 533 U.S. at 443, quoting 424 U.S. at 47.[31]

Because the majority erroneously regarded this Court's prior coordination decisions as controlling, it failed to consider plaintiffs' arguments that BCRA §§ 202 and 214(a)(2) would, without proof of "agreement or formal collaboration," reach a substantial number of legitimate and protected contacts between citizens and candidates or political parties.[32] Merely informing a candidate or party

[31] As noted by the majority below, S.A. 142sa, the Court in *Colorado II* did state that the coordination rule could not be avoided by "wink and nod" arrangements. 533 U.S. at 442. This oblique and unexplained reference, however, hardly stands as authority for eliminating the requirement of "agreement or formal collaboration."

[32] The December 2000 FEC regulations specifically required that, in order to rise to the level of coordination, discussions with candidates or parties regarding certain aspects of a communication had to be "substantial" and result in "collaboration or agreement." See 11 C.F.R. § 100.23(c)(2)(iii) (2001), repealed by Pub. L. 107-155, § 214(b) (2002), 116 Stat. 81. In adopting the requirement of "collaboration or agreement" as a required element of coordination, the Commission stated that the purpose of the condition was to "establish a 'buffer zone' for protected

official about issues and urging them to take particular positions on these issues is core political speech. So is informing a candidate or party about a group's own activities taken on its behalf. *Federal Election Commission v. Christian Coalition Inc.*, 52 F. Supp. 2d at 92-95. And, citizens have a right to work in candidates' campaigns and for political parties, see *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. at 230-31, without having the information they may thereby obtain about the candidates' or parties' plans jeopardize their right to make independent expenditures in behalf of those candidates. Such conduct may be regulated without offending the First Amendment only where it presents the same danger of corruption as cash contributions, and that is only possible, as the Court's previous decisions reflect, where the candidate or party and the citizen have reached "agreement or formal collaboration."

IV. BCRA'S ADVANCE DISCLOSURE REQUIREMENTS ARE NOT NARROWLY TAILORED TO SERVE A COMPELLING GOVERNMENTAL INTEREST AND THEREFORE VIOLATE THE FIRST AMENDMENT.

"[C]ompelled disclosure [of political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Buckley v. Valeo*, 424 U.S. at 64. The government's interests in mandating disclosure therefore "must survive exacting scrutiny," *id.* at 64, citing *NAACP v. Alabama*, 357 U.S. 449, 463 (1958); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963); *NAACP v. Button*, 371 U.S. 415, 438 (1963); and *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), and must be narrowly tailored to serve important governmental interests.

In upholding FECA's requirement for after-the-fact reporting of independent expenditures in *Buckley*, the Court

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speech," see 65 Fed. Reg. at 76141, and that "this new rule is more protective of First Amendment rights than the standard it is replacing." *Id.*

recognized only three governmental interests sufficiently compelling to support mandatory disclosure and reporting of political expenditures: (1) providing the electorate with information as to where political campaign money comes from and how it is spent, 424 U.S. at 66; (2) deterring actual corruption and avoiding the appearance of corruption by exposing large contributions and expenditures to the light of publicity, *id.* at 67; and (3) gathering the data necessary to detect violations of the Act's contribution limitations. *Id.* at 68. BCRA's advance reporting requirements are not narrowly tailored because each of these governmental interests can be fully served by requiring persons making "electioneering communications" to disclose their expenditures within a reasonable period *after* the communications have been aired, not when they have merely contracted to make such expenditures. *Cf. Thomas v. Collins*, 323 U.S. at 540. In contrast, mandatory disclosure of expenditures for communications *before* they have run may, as Judge Henderson found, S.A. 271sa, chill speech by forcing speakers to disclose their plans and strategies before they are implemented, giving speakers' opponents an opportunity to prepare counter-messages, and allowing opponents the opportunity to induce broadcasters not to run the ads at all. In addition, as Judges Leon and Kollar-Kotelly found, advance notice may actually be counterproductive because "[i]nformation concerning contracts that have not been performed, and may never be performed, may lead to confusion and an unclear record upon which the public will evaluate forces operating in the political marketplace." S.A. 114sa.[33]

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[33] Defendant FEC itself has recognized that "until a person or entity actually airs an electioneering communication, it is impossible to know with certainty that the person or entity ever will air a communication that constitutes an electioneering communication under BCRA; accordingly, to require reporting beforehand could lead to speculative and even inaccurate reporting through no fault of the reporting person or entity." Notice of Proposed Rulemaking, "Electioneering Communications," 67

For these reasons, the lower federal courts uniformly have ruled that advance reporting of political expenditures is not narrowly tailored to serve a compelling governmental interest and should be struck down. See *Citizens For Responsible Government State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000); *Wisconsin Realtors Ass'n v. Ponto*, 233 F. Supp. 2d 1078, 1091 (W.D. Wis. 2002); *Florida Right to Life, Inc. v. Mortham*, 1998 U.S. Dist. LEXIS 16694 at *30 (M.D.Fla. 1998). See also *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002 (9th Cir. 2003). Advance disclosure of electioneering communications similarly will chill the exercise of free speech by forcing groups such as the AFL-CIO to disclose ongoing and confidential political strategies and by giving their opponents the opportunity to interfere with the communications. S.A. 271sa (Henderson Findings 53g-i). The district court's decision invalidating section 201(a)'s advance reporting requirement should therefore be affirmed.

Fed. Reg. 51131, 51141 (Aug. 7, 2002). The Commission also noted that there could be "constitutional issues" with compelling disclosure of potential electioneering communications before they are finalized and aired, "particularly when such disclosure could force reporting entities to divulge confidential information, and could force them to report information, under the penalty of perjury, that later turns out to be misleading or inaccurate if the reporting entity does not subsequently air any electioneering communications." *Id.*

CONCLUSION

The decision of the district court concerning BCRA's prohibition against union and corporate spending for the primary definition should be affirmed; its decisions upholding the backup definition and BCRA's coordination provision should be reversed; and its decision striking down BCRA's advance disclosure provision should be affirmed.

Respectfully submitted,

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